Public Prosecutor v Uthaya Kumar a/l Ponnusamy & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO 43–14 OF 2007
ABANG ISKANDAR JC
11 FEBRUARY 2008

Criminal Procedure — Revision — Revisionary powers of High Court — Exercise of power of revision — Whether fit and proper case to invoke power of revision

Criminal Procedure — Seditious — Charge — Particulars of — Whether essential ingredients of offence contained in charge — Failure to append transcript of impugned speech in Tamil language — Whether charge defective — Whether transcript in Tamil language amounted to evidence — Whether errors occasioned failure of justice — Whether accused prejudiced

This is an application by the public prosecutor to revise the order handed down by the sessions court judge ('SCJ') who had discharged the three respondents from the charge under s 4(1) of the Sedition Act 1948 ('the Act'). The SCJ held, inter alia, that the charges against the respondents were defective because they did not have annexed to them, a transcript in the Tamil language, of the speeches that contained the alleged seditious words. As the transcript was not attached to the charges, the SCJ had discharged the respondents because, to her mind, such omission had caused ambiguity to the respondents in the understanding of the said charges. The SCJ however, observed that the translation of the speech, regarding the alleged impugned words in Bahasa Malaysia, as appended to the charges, were seditious. The central issue herein revolved on what a criminal charge must contain in order that it becomes a sufficient legal notice to an accused person, in particular on a charge for sedition.

Held, allowing the application:

(1) The impugned charges were proper and were in no way defective. It has never been the purpose of framing a charge that evidence be included in it. This is for the simple reason that there can never be 'evidence' adduced at the charging stage (see para 14).

(2) The transcript in the Tamil language would constitute evidence, and as such, would have no place in the amended charge. It is not an essential ingredient of the offence of sedition under s 4(1) of the Act, but it is a means of proving the ingredient of seditious words having been uttered by the respondents. For the immediate purpose of a charge under s 4(1)

of the Act, a translation of the impugned speech would suffice as notice to convey to an accused person the alleged seditious words (see para 15).

(3) The SCJ had erred when she ordered the prosecution to attach the transcribed speech in the Tamil language to the charges when in fact and in law there was no such legal obligation on the prosecution. As such, the numerous orders that the SCJ had made pertaining to the charges could not be sustained (see para 23).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pendakwa raya untuk menyemak perintah yang diputuskan oleh hakim mahkamah sesyen ('HMS') yang membebaskan ketiga-tiga responden daripada tuduhan di bawah s 4(1) Akta Hasutan 1948 ('Akta'). HMS memutuskan, antara lain, bahawa tuduhan-tuduhan terhadap responden-responden adalah cacat kerana tidak dilampirkan bersamanya, transkrip dalam bahasa Tamil, mengenai pertuturan-pertuturan yang mengandungi perkataan-perkataan hasutan yang didakwa. Memandangkan transkrip tidak dilampirkan dengan kepada tuduhan-tuduhan, HMS membebaskan responden-responden kerana, menurut beliau, peninggalan sedemikian telah menyebabkan kekaburan kepada responden-responden di dalam memahami tuduhan-tuduhan tersebut. Walau bagaimanapun HMS memutuskan bahawa terjemahan pertuturan tersebut, berkaitan perkataan-perkataan yang didakwa tersebut di dalam Bahasa Malaysia, seperti yang ditambahkan kepada tuduhan-tuduhan adalah menghasut. Isu utama di dalam kes ini berkisar atas apa yang mesti terkandung dalam tuduhan jenayah membuatkan ia menjadi notis undang-undang yang memadai terhadap tertuduh terutamanya atas tuduhan untuk hasutan.

Diputuskan, membenarkan permohonan:

(1) Tuduhan-tuduhan yang dipersoalkan tersebut adalah betul dan bukan dalam apa cara sekalipun cacat. Ia tidak pernah menjadi tujuan untuk merangka tuduhan bahawa keterangan mesti dimasukkan di dalamnya. Ini adalah untuk alasan yang ringkas bahawa tidak akan terdapat 'keterangan' dikemukakan pada peringkat tuduhan (lihat perenggan 14).

(2) Transkrip dalam bahasa Tamil akan membentuk keterangan, dan oleh itu, tidak mempunyai tempat di dalam tuduhan pindaan tersebut. Ia bukan bahan penting kesalahan hasutan di bawah s 4(1) Akta, tetapi ia adalah cara membuktikan bahan perkataan-perkataan hasutan yang dituturkan oleh responden-responden. Untuk tujuan segera terhadap tuduhan di bawah s 4(1) Akta, terjemahan pertuturan yang dipersoalkan mencukupi sebagai notis untuk menyampaikan kepada tertuduh perkataan-perkataan menghasut yang didakwa (lihat perenggan 15).

(3) HMS tersilap apabila beliau memerintahkan pendakwaan untuk melampirkan pertuturan yang ditranskripsikan di dalam bahasa Tamil

kepada tuduhan-tuduhan apabila sebenarnya tidak terdapat tanggungjawab undang-undang sedemikian ke atas pendakwaan. Oleh itu, perintah-perintah yang banyak tersebut yang dibuat oleh HMS berkaitan tuduhan-tuduhan tersebut tidak dapat bertahan (lihat perenggan 23).]

Notes

For cases on charge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 952–1386.

For cases on revisionary powers of High Court, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3172–3190.

Cases referred to

Krishnan & Anor v PP [1981] 2 MLJ 121, FC (refd)
Lim Beh & Ors v Opium Farmer (1842) 3 Ky 110 (refd)
PP v Au Seh Chun [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56, HC (folld)
Eng Song Hai v PP [1954] MLJ 38, HC (refd)
PP v Oh Keng Seng [1980] 2 MLJ 244, FC (refd)
Tan Lay Chen v PP [2001] 1 MLJ 135; [2000] 4 CLJ 492, HC (refd)
Yoh Meng Heng v PP [1970] 1 MLJ 14, HC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 152, 152(2), (3), 173(g), 325(2), 326
Sedition Act 1948 s 4(1)

M Manoharan (M Manoharan & Co) for the accused.
Mohd Yusof Zainal Abiden (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Abang Iskandar JC:

[1] I had made my ruling in this revision which, in effect, overturned the order of the sessions court judge ('SCJ') sitting at Klang which had discharged the three respondents from the charge under s 4(1) of the Sedition Act 1948. I am now setting out the grounds for my said ruling.

[2] Going straight to what had happened at the Klang Sessions Court, according to the SCJ, the charges against the respondents were defective because they did not have annexed to them, a transcript in the *Tamil* language, of the speeches that contained the alleged *seditious words*. Because the said *transcript* was not attached to the charges, she had discharged the respondents because to her mind such omission had caused ambiguity to the respondents in the understanding of the said charges, thus embarrassing the preparation of their defence. It is interesting to note that the SCJ had commented that having

looked at the translation of the speech in Bahasa Malaysia which was appended to the charges, she was of the tentative view that the alleged impugned words were seditious.

[3] Pursuant to an application made by the public prosecutor to this court to revise the said order handed down by the SCJ sitting at Klang, I had invited parties to submit before me on the matter. The learned public prosecutor had appeared together with the learned Head of Crime Division, Attorney General's Chambers. All the three respondents were represented by a team of counsel headed by learned counsel Mr M Manoharan, though the third respondent was not present. After hearing submissions on his being absent in court, I had ruled that as he was represented by a battery of legal counsel, his presence could be dispensed with, as provided for in the Criminal Procedure Code ('CPC') relating to revision, in particular, s 326 therein.

[4] I had the opportunity of hearing to submissions made by parties both on 5 December 2007 and today.

Basically, the bone of contention among parties in this matter must necessarily revolve on what a criminal charge must contain in order that it becomes a sufficient legal notice to an accused person, in particular on a charge for sedition. But before submissions could be heard on that issue, learned counsel for the three respondents had tried to convince me that this court's powers on revision were limited and ought to be exercised sparingly. More specifically they submitted that this case was *not* a proper one wherein which I should invoke such power of revision. The learned public prosecutor had submitted otherwise. Now, the power of revision is discretionary in nature. As such, it is different from an appeal. Whereas in an appeal it lies at the instance of aggrieved parties to pursue what would be their legal rights to be heard, a revision on the hand does not confer such rights to parties to be imposed on the court. Once a matter comes to the attention of the court on revision, it is entirely up to the court as to how to deal with it. It may decide to revise on its own after looking at the notes of proceedings, even without hearing parties to the criminal proceedings in the court below. Hearing out of parties is nearly entirely discretionary, subject only to one limitation, which is that as contained under s 325(2) of the CPC, which reads:

> No order under this section shall be made to the *prejudice* of the accused, unless he has had an opportunity of being heard, either personally or *by advocate*, in his own defence.

[5] In this case, the SCJ sitting at Klang had ruled and dismissed as groundless the respective charges under s 4(1) of the Sedition Act 1948 on the sole reason that they did *not* have appended to them the *transcript* of the impugned speech in the *Tamil language*. A *translation* of the impugned speech

in the Bahasa Malaysia language, which was appended and duly underlined to indicate the alleged seditious words, was apparently *not* good enough, because according to the SCJ sitting at Klang, such an omission by the prosecution to append the *transcript* had caused ambiguity, thus causing an embarassment to the three respondents in the preparation of their defence to the respective charges. To my mind, that involved a serious legal issue on what would constitute a proper charge under s 4(1) of the Sedition Act 1948. Suffice to say here that the power of revision as crafted in the CPC to be rather wide so as to ensure that justice can be done. It is in the nature of a supervisory or paternalistic power that the High Court is mandated, to oversee the administration of justice in the lower courts. In this case, the SCJ sitting at Klang had dismissed serious charges under the Sedition Act 1948, before pleas were taken from all the respondents, on the ground that they were *groundless*. To my mind, such a situation had fallen squarely within my revisionary jurisdiction whereby I could address my mind to it, with a view to ascertain the correctness or otherwise of the said order by the SCJ sitting at Klang. I had therefore ruled that this case was a fit and proper case for me to exercise my power of revision.

[6] On that consideration, I had agreed to hear out parties' submissions whether the SCJ sitting at Klang was justified when she had ruled as she did, in that the amended charges must be dismissed as being groundless.

[7] The purpose of a charge, to my mind, is primarily to ensure that a person who is being accused of a criminal offence, is given due notice of the offence as mentioned in the charge. Invariably, in most cases, it defines what the offence is all about. Generally, in doing so, the charge bears out the essential ingredients of the offence contained in the charge and in so doing, the accused is given the earliest legal notice that his impugned conduct has come to be within the legal sphere of a definitive criminal offence. In the case of *Lim Beh & Ors v Opium Farmer* (1842) 3 Ky 110, the accused was convicted on a charge framed as 'infringing the Opium Regulation'. The accused appealed on the ground that the charge preferred against him was vague. The High Court agreed and said:

> If there be one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may know with what he is charged and may be prepared to answer the charge in the best way.

[8] So, in the main, a charge is about the notification of the legal elements of the offence which the accused has the right to know in order that he will be able to prepare his defence and be prepared and ready to usefully face the charge during trial. If a charge does not sufficiently bear out the essential feature(s) of the offence, it may become a charge for an offence that is not known in law, and

as such it becomes liable to dismissal by the court because it is then a groundless charge and that the accused has been embarrassed in the preparation of his defence. A groundless charge may be dismissed under s 173(g) of the CPC.

[9] To my mind, a defence is embarassed not so much for want of particulars (unless the particulars are necessary to describe the offence), but rather because the charge is not properly framed so as to omit mentioning any of the legal ingredients or elements that constitute the offence, or in putting into a charge such a description of the impugned conduct that actually amounts to a duplication. That, in a nutshell is the true purpose of a charge.

[10] There is no denying that a charge is a very vital and important first step in a criminal prosecution. In reality, once a charge is filed, it sets the criminal prosecution into motion. Mere errors in the charge are not inevitably fatal as long as such errors have not occasioned a failure of justice to the accused person. What the law requires of a charge is that it must give sufficient notice to the accused person so as to enable him to prepare his defence. A *perfect* charge, if indeed a charge could be described as such, *is one that fulfills within its parameters, all the legal requirements pertaining to the offence with which it is concerned, so as to facilitate reasonable preparation of the defence on the part of the accused person.*

[11] Under the CPC, a charge may be framed in such a way that the offence with which the charge is concerned need only be mentioned by its specific name by which it is commonly known, for instance, in the charge for murder. That would be sufficient notice to the accused to prepare his defence. (see s 152(2) of the CPC). The law does not require that the circumstances surrounding the commission of the murder be mentioned in the charge, although murder is such a heinous crime that attracts the capital punishment on conviction. However, where the law that creates the offence does not give it any specific name, then the definition of the offence must be stated in the charge. (See s 152(3) of the CPC). Section 152, Illustration (d) of the CPC would be an example of this *scenario*. Yet, the Supreme Court in *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 had ruled in the speech by Salleh Abbas FJ (as he then was) that it was not mandatory that a complete definition should be given in the charge because all that had to be stated in the charge must be sufficient notice as to enable him to answer the charge and that he be not misled or prejudiced by any such omission in the charge. So, how should a charge under s 4(1) of the Sedition Act, look like? How should it be framed? What particulars must it contain so as to be a sufficient legal notice that would fairly and reasonably assist a person accused under it to prepare his defence and not be prejudiced by it?

[12] Let us see what are contained in the impugned amended charges against all the three respondents in this case. I had noted that they were all similarly worded *except* for the names of the respective accused persons concerned and the respective *translated* speech that contained the alleged seditious remarks or utterances. All these impugned amended charges did not have attached to them the *transcript* of the alleged seditious words in the Tamil language. For our present purpose, I shall, at *random*, reproduce the amended charge against Uthaya kumar a/l Ponnusamy. That amended charge has been marked in the Sessions Court, Klang as *'A1'* and it reads as follows (in the original language):

> PERTUDUHAN PINDAAN
>
> Bahawa kamu pada 16 November 2007 antara jam lebih kurang 8.30 malam hingga 11.15 malam di Restoren Yun He, Lot 293 Sungai Rambai, Jalan Batang Berjuntai, Kuala Selangor, dalam Daerah Kuala Selangor, dalam Negeri Selangor, telah menyebut perkataan menghasut di dalam Bahasa Tamil sepertimana pada bahagian ucapan kamu yang telah digariskan (*teks terjemahan keseluruhan ucapan itu dilampirkan sebagai Jadual A kepada Pertuduhan ini*) dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 (Disemak 1969) dan boleh dihukum di bawah seksyen 4(1) Akta yang sama. (Emphasis added.)

[13] So, what information had actually been conveyed by that charge to the accused Uthaya Kumar? My reading of the said charge told me that on a certain date, at a certain time, at a certain place he had allegedly uttered words in Tamil that were alleged to be seditious and that as it was an offence to utter seditious words, the offending section and the Act that created the offence were also mentioned in the charge. In order to enable the accused Uthaya Kumar and the court to ascertain whether there was a seditious tendency as alleged, a *translation* in Bahasa Malaysia of the actual speech allegedly made by the accused person in the Tamil language, was appended to the charge with the portion which was alleged to be seditious duly underlined. That appended *translation* was a document that facilitated a clearer and better understanding of the charge so that the court could ascertain whether the underlined words were seditious, in terms of understanding the alleged seditious speech and for the accused and the court to see whether the alleged speech was seditious or had seditious tendency. It also served to inform the accused that the seditious words were attributed to him and so that he could prepare his defence accordingly. That was what could be gathered from the amended charge as preferred against Uthaya Kumar. So, having said that, has it been a proper charge in the sense that has it served its purpose in giving reasonable legal notice to Uthaya Kumar such that he was not prejudiced in the preparation of his defence? Suffice to say here that the amended charges against the other two respondents have been similarly framed and constructed.

[14] According to Uthaya Kumar and the other two respondents, the amended charges against them were bad and defective. According to their learned counsel, the *transcript* of the original speech in the Tamil language should have been appended to the amended charges so that they could prepare their defence to the said charges. According to them, the Tamil language is such that one word could have several meanings and they had illustrated in the court below, a few examples of these words and their probable meanings. The learned counsel had also submitted that 'there is no legal basis to *refuse* to append the original Tamil text to the charge.' The learned public prosecutor disagreed and before me, had reiterated that what was pleaded by learned deputies before the SCJ sitting at Klang, had represented the correct legal position on the matter. Essentially, the case for the prosecution had been that the impugned amended charges were properly framed and drafted in that they were sufficient notice to all the three respondents for them to prepare their respective defence. It was the contention of the prosecution that the *transcript* in the Tamil language would be evidence that will be produced at the main trial by and by. Indeed, in the light of the new provisions under s 51A of the CPC, the respondents could in all probabilities be extended a copy of the *transcript* even before the trial started if the prosecution intended to use it as a piece of its evidence during the trial. But still, be that as it may, such *transcript* had no place in the charge. Not at that stage. Having considered the submissions by both parties, I agreed with the learned public prosecutor that the impugned charges were proper and were in no way defective. It has never been the purpose of framing a charge that *evidence* be included in it. This is for the simple reason that there can never be 'evidence' adduced at the charging stage. In a competent court of law, once a charge is read and explained, a plea is then taken from the accused person. If he decides to plead guilty, he will be dealt with accordingly and no calling of witnesses will be necessary to lead evidence in order to prove the ingredients of the offence. Bellamy J, had ruled as such in the case of *Eng Song Hai v Public Prosecutor* [1954] MLJ 38 and Augustine Paul J (as he then was) also echoed the same opinion in the case of *Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135; [2000] 4 CLJ 492. If however, the accused person decides not to plead guilty and claims trial, only then evidence will be led by calling witnesses for the prosecution to prove the legal ingredients of the charge against him.

[15] Looking at the amended charges preferred against all the three respondents, I was of the considered view that all of them had been given reasonable opportunity and leeway to usefully prepare their defence on account of these amended charges. I had also agreed with the learned public prosecutor that the transcript in the Tamil language would constitute evidence, and as such, would have no place in the amended charge. It is not an essential ingredient of the offence of sedition under s 4(1) of the Sedition Act 1948, but it is a means of proving the ingredient of seditious words having been uttered by the respondents. For the immediate purpose of a charge under s 4(1) of the Sedition Act 1948, I was of the considered view that a *translation* of the

impugned speech would suffice as notice to convey to an accused person the alleged seditious words. It is worth noting really, that a charge is never about evidence. But the reverse is never further from the truth, because all the evidence that need to be led in court is everything about proving, or disproving a charge. The moment we are clear in our minds as to what constitutes the essential ingredients of the offence and what constitutes evidence necessary to prove the said offence, the task of framing a proper charge may well prove to be less tenuous and less controversial in effect.

[16] I was further fortified in my belief that the impugned amended charges were proper, after referring to the decision of the then Federal Court in the case of *Public Prosecutor v Oh Keng Seng* [1980] 2 MLJ 244. In that case, the charge had read as follows:

> That you on the 23rd day of June, 1972 between 8.40 p.m. and 9.35 p.m. at the Padang Besar, Tampin, in the District of Tampin, in the State of Negeri Sembilan, uttered seditious words in Mandarin (*the full translation of the text of which is attached as Schedule 'A' to this charge*) and that you have thereby committed an offence under section 4(1)(b) of the Sedition Act 1948 (Revised 1969) and punishable under section 4(1) of the said Act. (Emphasis added.)

[17] If the impugned amended charges before me today were *juxtaposed* alongside the charge obtaining before Their Lordships of the Federal Court in that *Oh Keng Seng's* case, as appears above, it would be all too easy to see the striking *resemblance in the manner in which both the impugned charges and the charge against Oh had been framed*. It is interesting to note that the document that was appended to the charge in the *Oh Keng Seng's* case was the translated speech of the accused into English from the Mandarin language, *not* the *transcript of the original speech* in Mandarin as attributed to the accused person. Had Their Lordships found the charge as framed above against *Oh* to be in any manner defective in that regard, they would have directed their minds to it accordingly. But Their Lordships, comprising an esteemed panel of Justices Suffian LP, Raja Azlan Shah CJ (Malaya) and Wan Suleiman FJ, *made no adverse comment on the charge as it stood scrutinized before them*. In fact, the point that was raised before Their Lordships was more serious and critical whereby the legal challenge that was mounted before Their Lordships related to the issue of whether it was necessary to set out the particular words of the law defining sedition in the charge. Their Lordships had answered that question in the negative and went on to say that *'what the law requires is that the speech alleged to be seditious should be set out in the charge'* and then it is for the court to decide having considered all the evidence whether those words mentioned are seditious.

[18] I noted that Their Lordships had said '*the speech*' that was alleged to be seditious to be set out in the charge. Their Lordships did not say that the speech

to be set out in the charge must be in the transcribed form of the original language it was spoken. In the case before Their Lordships, the charge against *Oh* had contained, as an appendix, a *translation* in English, of the impugned speech which was uttered in Mandarin allegedly by *Oh.* Surely Their Lordships would have adversely commented on the use by the prosecution in that case of a *translation in English* instead of a *transcription* in Mandarin, if the law had required that the transcription of the speech in the original language must be set out in the charge. Indeed, Their Lordships were unanimous in their decision that *such a charge* preferred under s 4(1) of the Sedition Act was proper, although it had not contained the words that would describe the offence. The fact that Their Lordships did not adversely comment on the lack of *a transcription in the Mandarin language* of the impugned speech in the charge must imply that a translation into the English language was sufficient. In fact, Justice Wan Suleiman FJ, when ruling that Ong J had erred (in *Yoh Meng Heng v Public Prosecutor* [1970] 1 MLJ 14), had said:

> The offending passages of the speech, in our considered opinion, (and Ratanlal's specimen charge required only the words to be mentioned), had *been sufficiently indicated*, the appellant was in no way embarrassed or prejudiced in his defence. (Emphasis added.)

[19] It is worth noting that in the charge as framed against *Oh*, the alleged seditious words had resided in the *translation of the speech in the English language* and still learned Justices in the Federal Court had considered that the *factum* of the alleged seditious utterances had been sufficiently indicated to *Oh* thereby occasioning no prejudice to him in anyway. It has been 27 years since the *Oh Keng Seng*'s case was decided by the Federal Court the way it did and *no case* had been produced before me that had ruled, or even suggested that Their Lordships had *grievously erred in any way* in the manner that they had decided in that case. Therefore, I was of the considered view that a charge under s 4(1) of the Sedition Act could only be ruled as groundless ab initio, if the alleged seditious words in the speech were not set out in the charge, and that as in *Oh Keng Seng's case*, a translation of the speech would suffice to fulfill that purpose in such a charge and no injustice would thereby be occasioned to an accused person. That being the case, by necessary inference, as the impugned charges before me were startlingly similar, in the manner in which they had been framed, both in form and substance, to the charge in *Oh Keng Seng*'s case I was of the considered view that they *too* must be *good in law*.

[20] The view which I had taken in dealing with this matter had been that I could only agree with the three respondents if they could convince me that the appending of the *transcript* of the alleged seditious speech in the Tamil language was a legal requirement that had imposed a legal obligation on the prosecution to do so in the charge under s 4(1) of the Sedition Act. Unfortunately for them,

my reading of the provisions relating to the framing of charges, as contained in our CPC had done nothing to convince me to share a view that was consistent with their stand. With respect, this was not a case of 'there being no legal basis to refuse to append the original Tamil text to the amended charge' as learned counsel for the three respondents had wanted to make it out to be. Rather, it was a simple case of there being no legal obligation on the prosecution to so append the transcript to the amended charges. If there was such legal obligation to append, then the prosecution could not refuse to do so. If there was such a legal obligation obtaining here, then the omission by the prosecution to so append the *Tamil transcript* must indeed render the amended charges groundless ab initio and thus liable to be dismissed. But in my considered view, there was no such obligation on the prosecution in this case. Justice Suriyadi Halim Omar J (as he then was), in *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56, after deliberating on the relevant provisions in the CPC on powers of the courts in relation to a charge, had occasion to observe the true import of s 173(g) of the CPC thus:

> It would follow therefore that when a charge is groundless ab initio, it must mean that the *basis is clearly insufficient to meet the minimum requirement of the accusation.* (Emphasis added.)

[21] Indeed, I have no reason whatsoever to quarrel with His Lordship's acute observation on s 173(g) of the CPC. Besides, there exists a highest authority, which to my mind, by necessary implication clearly does not appear to lend support to the respondents' cause.

[22] In this case under revision, there is nothing to stop the respondents *during trial,* in the event that they plead not guilty and claim trial, to challenge the translation or the transcript, both in terms of admissibility and the proper weight to be attached, but definitely *not* at this stage of the criminal proceeding. As the saying goes, it's still early days yet.

[23] In conclusion, the SCJ sitting at Klang had erred when she ordered the prosecution to attach the transcribed speech in the Tamil language to the charges when in fact and in law there was no such legal obligation placed on the prosecution to do so. As such, the numerous orders she had made on 26 November 2007, pertaining to the charges could not be sustained as they had been premised upon a misconception of what she had deemed the law to require to be contained in a charge under s 4(1) of the Sedition Act 1948. She had misdirected herself, by mistaking a matter which *goes to evidence* for something that was to her mind, an essential ingredient of the offence, or a material particular that was needed to be set out describe the offence, when in

fact, such has never been the legal position pertaining to the framing of a charge in a sedition case under s 4(1) of the Sedition Act 1948. No doubt the transcript will be a relevant piece of evidence during the trial in order to prove the alleged seditious utterances attributable to the three respondents, but in the context of framing a charge under s 4(1) of the Sedition Act, the prosecution is under no legal obligation to have it appended thereto. And at the risk of being repetitious, the decision of the Federal Court in the *Oh Keng Seng*'s case, flew across the face of this court as described above on a related matter and I cannot pretend to be oblivious of its presence. The fact that *the prosecution had not appended the transcription of the speech in the Tamil language to the amended charges against the three respondents, did not render the said charges defective and liable to be dismissed as being groundless.* By dismissing the amended charges as being groundless the SCJ sitting at Klang had indeed erred and it had become incumbent upon me to therefore would set aside her orders. In the upshot, I would revise her orders accordingly and I hereby rule that all the impugned charges are, in their present form, proper and do not, in anyway contravene the provisions on charges as contained in the CPC. I further ruled that in their present form, the impugned amended charges are by no means groundless. They had borne out clearly the offence as envisaged under s 4(1) of the Sedition Act 1948 and that the three respondents were alleged to have committed such offence in the manner set out therein. To my mind, nothing could have been clearer than that in bringing home to the three respondents what they had to answer as *per* the amended charges. Order accordingly.

[24] I could not fathom what Mr Manoharan meant when he submitted before me that the same SCJ sitting at Klang would be embarassed by my order as she had made her directions regarding the charges. Suffice for me to say that the very purpose of a revision order by the High Court, is to put right a wrong that had been committed by the lower court.

[25] As such, the three respondents were ordered to be produced before the same SCJ at Klang and the amended charges were to be read and explained to them and their pleas recorded accordingly.

APPEAL AGAINST REFUSAL BY ME TO GRANT AN ADJOURNMENT IN APPLICATION FOR A STAY OF EXECUTION.

[26] There has been another appeal filed by the three respondents and that concerned my refusal, on 12 December 2007, to grant their application for an adjournment in the hearing of their application for stay of execution against my order that revised the decision of the SCJ sitting at Klang, that had dismissed the amended charges for being defective and thus groundless.

[27] When the case came up for hearing before me, only the second applicant, Ganapathy Rao appeared. The first applicant, Uthaya Kumar was in police custody having been arrested the day before. The third applicant, according to counsel who appeared to represent *all the three applicants,* could not be contacted. The impression which they wanted this court to believe was that they did not know where he was. I was ready to proceed to hear the applications under such circumstances as they were all represented by counsel. After all, these applications for stay were in relation to the order that I had made pursuant to a *revision* involving the same three applicants. As such, consistent with s 326 of the CPC, their counsel were competent to appear for them. However, the same lawyers insisted on the presence of the first applicant, whom they knew was in police custody for at least 24 hours in order to facilitate police investigations. When the second applicant, who was present and represented in court, was asked whether he had anything to say, he had told this court that he would *only proceed if the first applicant* was produced in court. If that was not done, he would not want to proceed. According to counsel for the applicants, as this was a criminal proceedings, the applicant must be present in court. But the fact that the third applicant who had also applied for the same stay was not in this court did not seem to matter at all to him! The second applicant did not even bother to mention about the third applicant. I found this fickle approach taken on the matter by counsel for the applicants to be rather difficult of comprehension. If the third applicant could be heard *'in absentia', figuratively speaking, why must the presence of the first applicant be one that must be insisted upon?* If the third applicant could be heard through his advocate, why must the prosecution of the second applicant's case by him be predicated upon the presence of the first applicant in this court? I could not fathom the logic in the argument which counsel were trying hard to convince, even themselves. I could not say that learned public prosecutor was way off the mark when he had said that 'what was good for the goose was equally good for the gander'. These applications were not a consolidated one and therefore could be pursued individually by each applicant. When I indicated to parties that I would proceed to hear the merits of the application for stay, counsel then had asked for an *adjournment*. When I told them that there was nothing to prevent them from submitting on matters which were basically points of law, they then had informed this court that, as they did not have instructions from their clients, they were withdrawing from further acting for the applicants. So, under the circumstances, I found that there were no more applications to be prosecuted before me, on the application for stay. I had then dismissed the applications for want of prosecution. That being the case, there was no stay application proceedings to be *adjourned* by me.

[28] Before I leave these matters, I must record this court's thanks to the Rt Hon Public Prosecutor and Datuk Mohd Yusof bin Zainal Abiden for the prosecution and Mr M Manoharan and his team of counsel, for their able submissions before me.

Plaintiff's application allowed.

Reported by Ashgar Ali Ali Mohamed